No. 92-989

In The

Supreme Court of the United States

October Term, 1993

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE JUDGMENT OF THE TENNESSEE SUPREME COURT DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Respondent begins his argument with an extended effort to persuade the Court, as he tried to do at the certiorari stage, that the Court lacks jurisdiction because the Tennessee Supreme Court relied on an adequate and independent state ground for its decision. This argument is without merit. Under *Michigan v. Long*, 463 U.S. 1032 (1983), this Court has jurisdiction unless the independence of the state law ground – here, Article I, § 16, of the Tennessee Constitution – is "clear from the face of the

opinion." *Long*, 463 U.S. at 1041. That standard plainly is not met.

This Court need only read the portion of the majority opinion concerning the issue presented (Part III) to see that nowhere does the Tennessee Supreme Court ever say, much less make "clear," that its holding under state law is independent of its view of federal law. To the contrary, every mention of the Tennessee Constitution is either directly accompanied by a reference to the Eighth Amendment or is immediately followed or preceded by the state supreme court's discussion of its view of Eighth Amendment law as part of its explanation of why it is construing its own constitution as it does. Moreover, on each occasion where the court states its holding, it relies jointly on the state and federal constitutions,[1] omitting any declaration of the independence of the two grounds. This omission is particularly telling after *Michigan v. Long* made clear the importance of such a declaration, and in light of the state court's clear recognition in Part II of its opinion that state law can in fact be independent of federal law. The opinion thus strongly suggests *dependence*, not independence, of state and federal law.

In any event, at a minimum, this is precisely the sort of situation that the rule in *Michigan v. Long* was designed

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[1] "We hold that . . . [Tennessee's statute] . . . does not narrow the class of death eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution. . . . " Pet. App. A62-63; "We, therefore, reverse the sentence on the grounds that the aggravating circumstance . . . is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution. . . . " Pet. App. A3.

to address. That rule fosters accountability in state court rulings; by requiring clarity in the ground of decision, *Long* enables erroneous federal law holdings to be corrected by this Court and any independently controlling state law interpretations to be clearly identified as such, permitting them to be altered by the people of the state (if they desire) through proper legislative or constitutional processes. In this case, failure by this Court to reach and decide the federal law issue would defeat accountability by leaving the true basis for the state court's decision in a muddle.

Respondent offers, at bottom, only three arguments against this conclusion, but none of the arguments are remotely persuasive. To begin with, respondent points to the fact that two members of the three-judge majority wrote a separate concurring opinion in which, briefly referring to the majority's ruling on the present issue, they mention only state law. *See* Pet. App. A74. Respondent asks this Court to infer that the Tennessee Constitution is the "narrowest basis for a judgment on which a majority agree, and must therefore be considered the basis for the Tennessee Supreme Court's judgment". Brief of Respondent, at p. 21. This argument fails both in its conclusion and in its premise.

First, even if respondent's reading of the concurring opinion were correct, the proper inference would be just the opposite of what respondent suggests: The majority opinion establishes the basis for the essential third vote; and that opinion, as explained, must be understood as relying on the interdependence of state and federal law, making federal law the controlling factor in the decision. Thus, the predicate of "independence" for jurisdictional

purposes – that the state court clearly reached its decision on grounds that would not be altered by any ruling this Court might render on federal law – is missing. Second, and in any event, respondent has overread the concurring opinion. The concurring judges, though their brief mention of this issue refers only to the Tennessee Constitution, never say that their view of the meaning of the Tennessee Constitution is independent of federal law. Indeed, any such statement would be surprising in light of their joinder of the majority opinion, which points toward dependence on federal law. Thus, the premise of respondent's first argument is itself wrong.

Respondent also places heavy reliance on the following sentence in the state court's opinion: "Our legislature, however, has seen fit to prohibit duplication by statute in non-capital sentencing, *see* TENN. CODE ANN. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits duplication in capital sentencing, as well." Pet. App. A49-50, *Quoted* in Brief of Respondent, at p. 21. This sentence, however, cannot establish the independence of the court's state law holding from federal law. Respondent has simply ignored the dispositive issue: *why* the majority construed state law as it did – in particular, whether the state law construction rested at all on the court's view of federal law. The analysis that follows the quoted language establishes just such interdependence, for that discussion is concerned primarily with the court's interpretation of federal law. Thus, far from making *independence* "clear," the "structure and wording" of the opinion below (Respondent's Brief at p. 21), strongly suggest the opposite.

The quoted reference to the state law bar on duplication in non-capital sentencing cannot support an inference of independence (much less a "clear" inference) for another reason as well. As we explain below, the state court's reversal of respondent's sentence does not in the end turn on any objection to duplication as such. The court's ruling therefore cannot be understood as independently resting on state law simply because the court referred to (an ultimately irrelevant) state law bar on duplication in another context.

Respondent's final contention is that the state court's citation to *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), and discussion of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), demonstrate that the judgment is based on state law independent of federal law. This argument is likewise incorrect. The state court's discussion of *Collins* serves merely to explain the history of the Tennessee Supreme Court's consideration of this issue in earlier cases. In no way do the references to *Collins* imply the independence of the state law and federal law holdings. The court then immediately proceeds to discuss *Lowenfield*, stating that "*Lowenfield* is inapposite and provides no rationale for constitutionality under the Tennessee Constitution." Pet. App. A62. What is telling is that the court found that the statute presented in *Lowenfield* was so different from the Tennessee statute that *Lowenfield* had to be distinguished on the facts, *not* on the basis that Tennessee law is independent of federal law. The court's omission of a plain statement of independence at that point in its opinion is powerful confirmation of the *dependence* of the state law rationale on federal law. It reconfirms that the opinion

lacks any clear indication of independence as required by *Michigan v. Long*.

Further, in *State v. Smith*, 755 S.W.2d 757, 768 (Tenn. 1988), the Tennessee Supreme Court held that there was no constitutional violation presented by this use of a felony murder aggravating circumstance in a felony murder case. In this case, the court overruled *Smith*, basing its action on its substantive analysis in *Lowenfield* and the erroneous conclusion that *Lowenfield* was inapposite not on the basis that Tennessee law is independent of federal law. This once again demonstrates the dependence of state law analysis on federal law analysis central to the court's decision on this issue.

II. THE TENNESSEE FELONY MURDER AGGRAVATING CIRCUMSTANCE "GENUINELY NARROWS THE CLASS" OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY IN A "RATIONAL AND PRINCIPLED MANNER".

On the merits, respondent seeks to defend the holding of the Tennessee Supreme Court that the use of the felony murder aggravating circumstance in a felony murder case violates the Eighth Amendment. Although it is difficult to determine the precise basis for this holding from either the majority opinion below or respondent's brief, a careful analysis reveals that the Tennessee felony murder aggravating circumstances satisfies all of this Court's Eighth Amendment requirements.

Respondent, and the Tennessee Supreme Court, argue that, in felony murder cases, the Tennessee felony murder aggravating circumstance does not "genuinely

narrow" the class of death-eligible murderers for two reasons: first, because it is overbroad; second, because it "duplicates" an element of the crime of felony murder. *See* Pet. App. A49-50, A62; Brief of Respondent at p. 49. They also contend that the felony murder aggravating circumstance does not narrow the class of murderers in a "rational" and "principled way." *See* Pet. App. A55; Brief of Respondent at p. 38-45. We will address each of these arguments in turn.

First, the Tennessee felony murder aggravating circumstance unquestionably provides "genuine narrowing" of the class of death-eligible murderers and is therefore not overbroad. Unlike the "outrageously or wantonly vile, horrible or inhuman" aggravator in *Godfrey v. Georgia*, 446 U.S. 420 (1980), or the "cold-blooded and pitiless" aggravator in *Arave v. Creech*, 507 U.S. ___, 113 S. Ct. 1534 (1993), there can be no plausible claim that the Tennessee aggravating circumstance applies to *all* murders. On the contrary, the felony murder aggravator clearly identifies a sub-set of murderers to be treated as death-eligible, and thus provides "genuine narrowing."

Second, the fact that the Tennessee felony murder aggravating circumstance may "duplicate" one of the elements of the crime of felony murder is without constitutional significance. In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), this Court held that "duplication," or "double-counting," does not violate the Eight Amendment. Nor can the court below or respondent convert "duplication" into a constitutional issue by claiming that it defeats the "genuine narrowing" requirement; this claim is also foreclosed by *Lowenfield*, in which a similar "bootstrapping"

effort was rejected by this Court. *Lowenfield*, 484 U.S. at 244-46.

The only remaining question, then, is whether the Tennessee felony murder aggravating circumstance narrows the class of death-eligible murderers in a "rational and principled manner." In the abstract, there can be no doubt – and respondent does not contest – the rationality of the felony murder aggravating circumstance. With respect to *any* killing (whether intentional or not), the fact that the killing occurred during the course of an intentional, serious felony adds significantly to *both* the harm caused to society *and* the defendant's overall culpability. Thus, the Tennessee Legislature's choice to make felony murder an aggravating circumstance for death penalty purposes is clearly "rational and principled."

Nevertheless, the state court and respondent both find the felony murder aggravator to be "irrational," "unprincipled," and "arbitrary" on the ground that it automatically renders death-eligible some persons who are far less culpable than even the least culpable intentional murderer, for whom death eligibility depends on the finding of another aggravating circumstance. But this "comparative justice" argument ignores how the Tennessee death penalty scheme does, and must, actually operate. The only felony murderers who are, or can be, singled out as death-eligible in Tennessee are those whose culpability *for the killing itself* is so great that it comes very near (or is the same as) the culpability of an intentional killer. For such persons, the simultaneous commission of an intentional, serious felony provides more than enough "rational" and "principled" additional

justification – there is additional culpability and additional harm to society – to make death an appropriate punishment, even when compared to the category of intentional murderers.

The fundamental flaw in respondent's argument is its failure to acknowledge the crucial fact that the Tennessee death penalty scheme does not – and *cannot* – render all felony murderers subject to the death penalty. Since this Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987), those felony murderers who do not kill, attempt to kill, intend to kill, or act as major participants in a serious felony while exhibiting reckless indifference to the value of human life, *cannot* – in Tennessee or anywhere else in the United States – be made subject to the death penalty. Tennessee prosecutors, Tennessee trial judges, and the justices of the Supreme Court of Tennessee are all well aware of their obligations to ensure that this federal constitutional mandate is observed in Tennessee. Respondent nowhere asserts that Tennessee felony murderers are being sentenced to death in violation of *Tison*.[2] Nor could such a claim be reasonably advanced, because, as the state court noted recently in setting aside a death sentence on the ground that it was disproportionate, only *one* person convicted of felony murder on Tennessee's death

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[2] Respondent does note that no *Tison* finding has been made in this case (*see* Brief of Respondent, at p. 46 n.27), perhaps hoping to imply that there might be some doubt as to whether the respondent meets the *Tison* culpability standard. Respondent, however, has never sought to challenge his death sentence on the ground that it might violate *Tison*, doubtless because evidence contained in the record would make such a claim totally unsupportable.

row did not actually kill the victim himself – and that individual "handed the killer the murder weapon, nodded to him to shoot the victim, who was seated in front of the killer, and shot the victim's body afterwards." *State v. Branam*, No. 03S02-9103-CR-00020, 1993 WL 209577, at *10 (Tenn. May 24, 1993) (Drowota, J., concurring). Clearly, the Tennessee courts take seriously their mandate under *Tison*.

Because *Tison* prohibits as a matter of federal constitutional law the execution of those felony murderers who personally are less than fully culpable for the death of their victim, the bulk of respondent's "narrowing" argument is completely misplaced. In the real world of Tennessee death sentencing, the only felony murderers who can lawfully receive the death penalty are those who satisfy *Tison*'s personal culpability standard. That standard requires them to exhibit culpability for the killing itself at a level nearly equal to that of an intentional murderer. Given that degree of culpability for the killing itself, the additional harm caused by the commission of a serious felony (with additional culpability for that felony) *does* rationally identify a sub-class of all first-degree murderers for whom the death penalty is particularly appropriate.

Accordingly, Tennessee has rationally concluded that any slight lessening of culpability for the killing is outweighed by the extreme societal harm (and culpability for the additional felony). Further, by making the killing of a victim during the course of a felony an aggravating circumstance, the Legislature has given felons a necessary special incentive not to kill their felony victims or other witnesses to their crimes. In short, for the relevant

post-*Tison* class of personally culpable death eligible felony murderers, it is perfectly rational and principled for the Tennessee Legislature to conclude that *all* such felony murderers should be subject to the death penalty, even though some premeditated murderers are not.

Respondent makes only two brief attempts to answer this central point. First, he claims that the "narrowing" function must be performed either at the guilt phase or at the sentencing phase of the capital trial. *See* Brief of Respondent, at p. 35. But, as we noted in our opening brief (at 15), this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), establishes that the narrowing function need *not* be performed at trial at all, but may be performed even by a state supreme court upon appellate review if it is pursuant to a non-vague aggravating circumstance. After all, the narrowing requirement is merely a means to ensure systemically rational, principled, and non-arbitrary death sentencing. Because Tennessee's death penalty scheme, viewed in its entirety, is rational and principled in its treatment of the relevant post-*Tison* felony murders, it is immaterial whether the narrowing function is performed at the guilt phase of the trial, at the sentencing phase, or even upon appellate review.

Respondent's second attempt is the bald assertion, at page 46 of his brief, that the *Tison* requirement and the narrowing requirement are "distinct, and both must be independently satisfied." While these two requirements are certainly "distinct," no decision of this Court suggests that they must be independently satisfied. Rather, in the particular context of this case, both requirements serve the same desired end of ensuring that the death penalty is imposed in a rational and principled manner. In any

event, respondent has raised no issue as to the *Tison* requirement. *See, supra,* p. 9. The only remaining question, then, is whether once *Tison* is satisfied, the Tennessee scheme rationally narrows the class of persons eligible for the death penalty. For the reasons set forth above, Tennessee's statute readily passes that test.

III. IN ANY EVENT, THE TENNESSEE STATUTE IS NOT INVALID AS APPLIED TO RESPONDENT BASED ON THE "COMPARATIVE JUSTICE" OF TREATING "SIMPLE" FELONY MURDERERS AS AUTOMATICALLY DEATH-ELIGIBLE, SINCE AN ADDITIONAL VALID AGGRAVATOR WAS FOUND TO BE PRESENT IN HIS CASE.

Respondent's complaint now appears to reduce to the claim that the Tennessee felony murder aggravating circumstance is not "rational and principled" because it renders all felony murderers automatically death-eligible, while intentional murderers are not automatically death-eligible. In light of the actual operation of Tennessee's death penalty scheme, this claim must fail on the merits. In addition, however, *even if* the claim were meritorious, respondent would not be entitled to invalidate *his* sentence on this ground because he is not a member of the class of persons alleged to be treated unfairly, namely, felony murderers eligible for the death penalty without any other aggravating circumstance.

Respondent's core argument about the unconstitutionality of the felony murder aggravating circumstance is unprecedented in the Eighth Amendment decisions of this Court. Respondent does not contend that the felony

murder aggravator is "vague." *Contrast, e.g., Godfrey v. Georgia*, 446 U.S. 420 (1980). Nor does he contend that it is so broad that it applies to *all* murders. *Contrast, e.g., Arave v. Creech*, 507 U.S. ___, 113 S. Ct. 1534 (1993). Nor does he contend that the aggravator is itself "irrational" or "unprincipled." *Contrast, e.g., Godfrey*, 446 U.S. at 434. n.16, (discussing gruesomeness of murder). These contentions, this Court's decisions suggest, can invalidate the sentence of *any* defendant whose death sentence rests on such an aggravating circumstance, since these defects in aggravating circumstances undermine *any* possible value it might have in the sentencing process.[3]

Here, by contrast, respondent does not challenge the validity of the felony murder aggravating circumstance on its own terms. Instead, he makes only a "comparative injustice" argument, claiming that the felony murder aggravator renders some persons automatically death-eligible (felony murderers with no additional aggravators) even though allegedly more culpable intentional murderers are not automatically death-eligible (intentional murderers require an additional aggravator). But respondent is not *even a member* of the class of persons he alleges to be treated unfairly. Rather, in his case, the sentencer found *another valid* aggravating circumstance to be present. Thus, even if there is an unconstitutional "comparative injustice" claim, that defect does not apply

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[3] Of course, a state court might still find the presence of such an invalid aggravating circumstance "harmless," if another valid aggravating circumstance was found to be present.

to respondent's case. For this reason, too, this Court should reverse the decision below.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be reversed.

Respectfully submitted,

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